

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HENRY S. BOCKES)	
Claimant)	
VS.)	
)	Docket Nos. 241,002 & 241,003
GRIFF-CO. INC.)	
Respondent)	
AND)	
)	
AMERICAN FAMILY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the May 30, 2001, Award of Administrative Law Judge Robert H. Foerschler. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to prove that he suffered an accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The Board held oral argument on December 4, 2001.

APPEARANCES

Claimant appeared by his attorney, Leah Brown Burkhead of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph R. Ebbert of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties agreed that the February 1, 1999, discovery deposition of claimant was properly a part of the record for consideration by the Board.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on November 16, 1998, and again on November 18, 1998?
- (2) Did claimant's accidental injuries arise out of and in the course of his employment with respondent?
- (3) Did claimant provide timely notice of the alleged accidental injuries?
- (4) Is claimant entitled to temporary total disability compensation for the period December 2, 1998, through May 20, 1999?
- (5) Is claimant entitled to reimbursement for or payment of accrued medical expenses by respondent?
- (6) Is claimant entitled to future medical treatment for these injuries?
- (7) Is claimant entitled to unauthorized medical treatment up to the statutory maximum?
- (8) What, if any, is the nature and extent of claimant's injury and/or disability suffered as a result of the alleged accidental injuries with respondent?
- (9) What is the amount of compensation due?
- (10) Are the unemployment records, which claimant offered into evidence at the regular hearing but which were objected to by respondent, properly included in the record for consideration by the Board?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed.

The Appeals Board agrees with the Administrative Law Judge's analysis of the evidence as set forth in the Award. The Board concludes the Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not

necessary to repeat those findings and conclusions in this Order. The Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

Claimant alleges he suffered accidental injury to his left upper extremity on November 16, 1998, while throwing boxes up onto a shelf, and again on November 18, 1998, while climbing, losing his balance and catching himself with his left arm. Claimant was diagnosed with a left distal biceps tendon rupture.

The Board finds particularly convincing the evidence provided from the medical records of Christopher A. Bagby, M.D., and the records from Shawnee Mission Urgent Care.

When claimant first appeared at the Shawnee Mission Urgent Care, the records from November 20, 1998, indicate claimant advised that he had injured his left arm "loading wood". Claimant then went to Dr. Bagby's office, requesting ongoing treatment for his left upper extremity. Dr. Bagby's November 20, 1998, office notes indicate that claimant injured his arm throwing wood up a hill.

Claimant testified at the preliminary hearing on March 25, 1999, that he had already advised Dr. Bagby of the inaccurate history of injury. However, the first note in Dr. Bagby's medical records regarding claimant's alleged work-related injury occurred on March 26, 1999, the date after claimant testified at preliminary hearing. The Board finds this timing suspicious.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g). Additionally, the Board has stated many times that an administrative law judge is in the enviable position to observe the testimony of witnesses in person. This allows the administrative law judge the opportunity to assess the credibility of the witnesses who appear before him. In this instance, claimant testified before the Administrative Law Judge on two separate occasions. The Administrative Law Judge found claimant's testimony to be less than credible in both instances. The Board gives credence to the Administrative Law Judge's opportunity to assess this credibility and finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged.

This finding renders the remaining issues moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 30, 2001, denying claimant benefits in the above matter should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of December, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director